Supreme Court, U. S.
FILED
DEC 10 1979
MICHAEL RODAK, JR., CLERK

79-900
No.

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

*v.*

STANDARD OIL COMPANY OF CALIFORNIA

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

The Solicitor General, on behalf of the Federal Trade Commission and its individual members, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, 3a-22a) is reported at 596 F.2d 1381. The order of the district court (App. A, *infra*, 1a-2a) is not reported. The order of the Commission denying respondent's motion to dismiss the complaint (App. E, *infra*,

27a-28a) is not reported. The order of the Commission denying respondent's motion for reconsideration (App. E, *infra*, 29a-31a) is reported at 83 F.T.C. 1759.

## JURISDICTION

The judgment of the court of appeals was entered on May 18, 1979. A petition for rehearing en banc was denied on August 6, 1979 (App. C, *infra*, 23a-24a). On October 29, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's deliberative process prior to issuing a facially valid administrative complaint stating that it has "reason to believe" that certain firms are engaged in unfair methods of competition, with supporting allegations, is a matter "committed to agency discretion by law" and thus not subject to judicial review under 5 U.S.C. 701(a)(2).

2. If the Commission's decision to issue an administrative complaint is not "committed to agency discretion by law," whether such action constitutes "final agency action" (5 U.S.C. 704) subject to immediate judicial review during the pendency of the ensuing administrative proceeding.

## STATUTES INVOLVED

Pertinent portions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and the judicial re-

view provisions of the Administrative Procedure Act (5 U.S.C. 701-706) are set forth in Appendix D, *infra*, 25a-26a.

## STATEMENT

1. The Federal Trade Commission is authorized by law to issue complaints initiating administrative proceedings whenever the Commission determines (1) that there is "reason to believe" that a company has been or is using an unfair method of competition, and (2) that such a proceeding would be in the public interest. 15 U.S.C. 45(b). On July 18, 1973, the Commission, through its Secretary, issued a certified administrative complaint charging that respondent Standard Oil Company of California and seven other major oil companies maintained a noncompetitive market structure and were therefore engaged in unfair methods of competition in violation of 15 U.S.C. 45(a). The complaint stated that the Commission had "reason to believe that the above-named respondents have violated and are now violating [15 U.S.C. 45]" and that formal adjudicatory proceedings with respect to the alleged violation would be "in the public interest" (R. 21).[1] The complaint contained allegations describing the manner in which respondent and the other named oil companies were said to be in violation of the law (R. 25-31).

In January 1974, respondent filed a motion to dismiss the administrative complaint, contending that the Commission had issued the complaint in response

[1] "R." refers to the record in the court of appeals.

to congressional pressure and without "reason to believe" that a violation had occurred and, further, that the proceeding was not in the public interest. The Commission denied the motion to dismiss (App. E, *infra*, 27a). It also denied a motion for reconsideration, on the ground that "[o]nce the Commission has resolved [the "reason to believe" and "public interest"] questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter" (App. E, *infra*, 30a).[2]

Following the denial of respondent's motions, the administrative proceeding went forward. The proceeding is still pending.

2. On May 1, 1975, respondent filed a civil action in the United States District Court for the Northern District of California, seeking an order compelling dismissal or withdrawal of the Commission's ad-

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[2] The Commission noted that both the adequacy of its determination that there is "reason to believe" that a violation of law has occurred and its belief that an adjudicatory proceeding is in the "public interest" are matters "that go to the mental processes of the Commissioners" and thus are not reviewable by the court (App. E, *infra*, 30a). In addition, the Commission observed that none of the communications received from members of Congress prior to the issuance of the complaint "is even remotely of the character deemed improper by the courts" (*id.* at 29a-30a, citing *e.g.*, *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966)).

ministrative complaint (R. 1-18).[3] Respondent alleged that in issuing the administrative complaint the Commission had acted arbitrarily and capriciously without facts sufficient to support a reasonable belief that respondent had violated the law. Respondent further alleged that the Commission's initiation of administrative proceedings was the result of improper consideration of congressional pressure and legally irrelevant political and economic factors (R. 15).

The Commission moved to dismiss the action (R. 90). The district court concluded that the issuance of the administrative complaint by the Commission was not subject to judicial review (Tr. 60-61)[4] and, accordingly, granted the Commission's motion to dismiss (App. A, *infra*, 1a-2a).[5]

A divided panel of the court of appeals vacated the judgment of dismissal. The court acknowledged that "a determination by the FTC that there is 'reason to believe' a violation of law has occurred is within the agency's discretion and not reviewable in the district court" under the Administrative Pro-

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[3] The district court complaint named the Commission and its individual members as defendants.

[4] "Tr." refers to the transcript of the argument before the district court on the motion to dismiss the action.

[5] At the conclusion of oral argument, the district judge stated: "I am in agreement with the suggestion of government counsel that a review of preliminary decisions made by administrative agencies, except under the most unusual circumstances, would be productive of nothing more than chaos" (Tr. 60).

cedure Act (5 U.S.C. 701(a)(2)) (App. B, *infra*, 10a). Nevertheless, it ruled that judicial review is available with respect to whether the Commission had in fact made the requisite "reason to believe" determination, notwithstanding the recitation on the face of the administrative complaint that such a determination had been made (*id.* at 12a). The court viewed the "reason to believe" provision of 15 U.S.C. 45(b) as restricting the Commission's exercise of discretion to issue administrative complaints, and concluded that this restriction provides "law to apply" (*Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971)) to the Commission's action in issuing the complaint.

The court also concluded (*id.* at 14a-15a) that the issuance of the administrative complaint constituted "final agency action for which there is no other adequate remedy at law," and that such action is immediately reviewable in the district court under 5 U.S.C. 704. It reasoned that if respondent's claim were not subject to review at this stage of the proceedings it might never be reviewed, for the following reasons: (1) in the event that respondent were to prevail in the administrative proceeding, its challenge to the issuance of the complaint would be moot; (2) if respondent sought to raise its claim upon review of a final cease and desist order, the record of the administrative proceeding in all likelihood would be insufficient for this purpose because the Commission's rejection of respondent's claim would

have foreclosed respondent from developing relevant facts; and (3) a court reviewing a cease and desist order is limited to considering whether substantial evidence supports the order and does not review alleged defects in the filing of a complaint (*id.* at 14a-15a). The district court was directed to determine on remand whether the Commission made a "reason to believe" determination, or "whether the complaint was issued solely because of outside pressure or with complete absence of a 'reason to believe' determination" (*id.* at 14a).

Judge Carter dissented (App. B, *infra*, 15a-22a), on the ground that the Commission's action initiating an administrative proceeding is in essence an exercise of prosecutorial discretion and, as such, is exempted from judicial review under 5 U.S.C. 701(a)(2) (*id.* at 16a-18a).[6] He noted that judicial inquiry into whether the Commission in fact made a "reason to believe" determination would improperly require the courts to probe the mental processes of the Commissioners (*id.* at 18a). Even assuming that respondent's claim may ultimately be subject to review, Judge Carter concluded (*id.* at 20a-21a) that it is not reviewable while the administrative proceeding remains pending, since the issuance of an administrative complaint is merely a preliminary determination

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[6] Judge Carter noted that in rare cases judicial inquiry may be permitted into whether the prosecutor's conduct falls outside the range of his discretion, but concluded that no such facts have been pleaded by respondent in this case (App. B, *infra*, 17a).

and is not "final agency action" within the meaning of 5 U.S.C. 704. In addition, he observed (*id.* at 22a) that respondent had failed to make a showing of "irreparable injury" necessary to overcome the rule requiring exhaustion of administrative remedies before judicial review may be sought. He predicted that under the majority's ruling, "there will be attempts in every FTC proceeding to seek review of some preliminary matter. This could cripple FTC's ability to function" (*id.* at 18a).

## REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the application of the Administrative Procedure Act's judicial review provisions to discretionary and preliminary determinations by federal administrative agencies to institute adjudicatory proceedings. In ruling that respondent may obtain review of the Commission's decision to issue an administrative complaint, the court of appeals has undermined the discretionary function exception to judicial review of administrative action codified in 5 U.S.C. 701(a)(2). As this Court's recent decision in *Southern Ry.* v. *Seaboard Allied Milling Corp.*, No. 78-575 (June 11, 1979) demonstrates, the ruling below misapplies the standards for determining when administrative action is committed by law to the agency's unreviewable discretion.[7] The ruling would also require the courts to

[7] Although the court of appeals' ruling was issued before this Court's decision in *Southern Ry.*, the Commission brought the *Southern Ry.* opinion to the court's attention in its petition for rehearing en banc.

probe the Commissioners' mental processes, contrary to the principles established in *United States v. Morgan*, 313 U.S. 409, 422 (1941). Moreover, the interlocutory review authorized here threatens serious disruption to the administrative process, a disruption that Congress intended to avoid in enacting 5 U.S.C. 704.

The unprecedented decision of the court of appeals is contrary to accepted principles of administrative law and, if allowed to stand, would undermine the effective and orderly conduct of enforcement proceedings before many administrative agencies. Federal agencies initiate hundreds of administrative proceedings every year. As Judge Carter pointed out in dissent (App. B, *infra*, 18a), the decision of the court of appeals is an open invitation to respondents in administrative proceedings to engage in disruptive and dilatory litigation of ancillary procedural issues in the courts during the early stages of such proceedings.[8] The holding affects not only the Commission,[9] but numerous other administrative agencies,

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[8] Indeed, even the majority below conceded that judicial intervention in the administrative process "would serve only to hamper or thwart the FTC's exercise of its responsibilities" (App. B, *infra*, 11a). While the majority was here referring to review of the merits of the Commission's "reason to believe" decision, there is no workable distinction between review of the merits and review of whether the Commission "independently" made its determination. See pages 12-13, *infra*.

[9] The "reason to believe" standard applies not only to Commission administrative complaints issued pursuant to Section

since "reason to believe" is implied or expressed in many statutes conferring administrative discretion to initiate a complaint proceeding.[10] The questions presented by this case are therefore of substantial importance to the effective functioning of many administrative agencies.[11]

1. The Administrative Procedure Act provides no authority for judicial review of the Commission's

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5 of the FTC Act, but also to its attempts to obtain injunctive relief (15 U.S.C. 53(b)) or criminal penalties (15 U.S.C. 56(b)), and to enforcement of other statutes (15 U.S.C. 68e(b), 68h (Wool Products Labeling Act); 15 U.S.C. 69f (Fur Products Labeling Act); 15 U.S.C. 70e, 70f, 70i(b) (Textile Fiber Products Identification Act).

[10] Numerous other regulatory statutes provide that complaints shall be issued if the agency has "reason to believe" violations of law are occuring. *E.g.*, 7 U.S.C. 9 (Commodity Futures Trading Commission); 7 U.S.C. 193, 292 (Secretary of Agriculture); 15 U.S.C. 21(b) (enforcement of the Clayton Act by ICC, FCC, CAB, Federal Reserve Board, and FTC); 15 U.S.C. 77j(b) (SEC's authority to issue order suspending use of prospectus and institute hearings); 15 U.S.C. 2064(g) (Consumer Product Safety Commission's authority to seek certain court relief); 42 U.S.C. 1973aa-2, 5309(c) (Attorney General's authority to bring certain civil rights enforcement actions); 42 U.S.C. 300h-3(c), 300j(e)(3) (EPA Administrator's authority to seek TRO or injunction). See 15 U.S.C. 77t(b), 78u(d) (authorizing the SEC to initiate court proceedings whenever it "appear[s] to the Commission" that violations of law are occurring). Cf. Fed. R. Civ. P. 11 (signing of pleading by attorney certifies that there is "good ground to support it").

[11] For these reasons, the general counsels of five agencies have written to the Solicitor General expressing concern about the harmful implications of the court of appeals' decision in this case. See App. F, *infra*, 32a-43a.

decision to issue an administrative complaint because the initiation of an enforcement proceeding is "agency action committed to agency discretion by law" (5 U.S.C. 701(a)(2)). The court below correctly held, under this provision, that "a determination by the FTC that there is 'reason to believe' a violation of law has occurred is within the agency's discretion and not reviewable in the district court under the APA" (App. B, *infra*, 10a). It distinguished, however, between the substance of the "reason to believe" determination itself, and the factual question whether the determination had been independently made by the Commission. The court concluded that as to the latter question, the "reason to believe" language in 15 U.S.C. 45(b) imposes a substantive legal restriction on the Commission's discretion to issue complaints which must be satisfied before the Commission acts; that this restriction provides "law to apply" within the meaning of *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971); and that the discretionary function exception of 5 U.S.C. 701(a)(2) is therefore inapplicable (*id.* at 11a-12a).

Although the discretionary function exception is admittedly "very narrow" (*Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 410), the court of appeals' mechanistic application of the language from *Overton Park*, without further analysis, is inconsistent with this Court's decisions explaining when agency action involves unreviewable discretion. *E.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*,

*supra*; *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960). "Whether agency action is reviewable often poses difficult questions of congressional intent; and the Court must decide if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion." *Barlow* v. *Collins*, 397 U.S. 159, 165 (1970). See *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). Thus, judicial review of agency action is foreclosed by 5 U.S.C. 701(a)(2) to the extent that the substantive statute reflects Congress' intent to vest in the administrative agency unreviewable discretion to exercise particular functions. Determination of such an intent depends on the language, structure and legislative history of the substantive statute, and decisions under analogous statutes. *Southern Ry.* v. *Seaboard Allied Milling Corp.*, *supra*, slip op. 17. The court of appeals failed to engage in this necessary analysis.

To begin with, the language and design of 15 U.S.C. 45(b) indicate that Congress intended the Commission's initiation of administrative proceedings to be unreviewable. The majority below conceded that a "reason to believe" determination by the Commission—including whether the Commission had an adequate factual basis for its allegations—is itself purely discretionary and thus unreviewable. It distinguished, however, between the abstract merits of the determination and whether the determination had been independently made by the Commission. But, for purposes of judicial review, there is no

meaningful distinction in the statute between the Commission's making of a determination that it has "reason to believe" that a violation has occurred, and the legal adequacy of the factual allegations in the complaint providing the reasons in support of that belief.[12] The statute provides that "[w]henever the Commission shall have reason to believe that any * * * corporation * * * is using any unfair method of competition [in respect to which a proceeding would be in the public interest], it shall issue and serve * * * a complaint stating its charges *in that respect* * * *. 15 U.S.C. 45(b) (emphasis added). The Commission determines that it has adequate reasons to initiate a proceeding when it concludes that the allegations in a proposed complaint are sufficient to warrant the initiation of a proceeding; it then directs its Secretary to issue the complaint. "Reason to believe" is thus inextricably linked to the Commission's undisputed responsibility to decide what kinds of business conduct may be unfair within the meaning of the statute. The statutory language and structure thus reflect an unambiguous intent to confer the widest discretion on the Commission to initiate complaints, for the Commission alone is empowered to

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[12] Moreover, if such a distinction were accepted, the reviewing court would be required to go behind the face of a certified and facially valid complaint. Cf. *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence).

determine in the first instance whether a method of competition or an act or practice is unfair.[13]

Moreover, the legislative history of the Federal Trade Commission Act also supports nonreviewability. The "reason to believe" language was inserted into 15 U.S.C. 45 by the Senate Committee on Interstate Commerce. S. Rep. No. 597, 63d Cong., 2d Sess. (1914). The committee report did not discuss the "reason to believe" standard as such. But it stressed the need for "wide discretion" in the conduct of investigations to avoid hampering administration of the Act, noting that "to almost every inquiry it might be possible to make specious objections which, while lacking any real merit, might effectually clog the conduct of the inquiry" (*id.* at 12).[14] To permit judicial review, particularly while the administrative proceeding is still in progress (see pages 17-21, *infra*), would frustrate the objectives of Congress in enacting the statute.

In addition, decisions in analogous cases strongly support our contention that the decision whether the

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[13] See, *e.g.*, *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 367 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *United States* v. *Morton Salt*, 338 U.S. 632, 640 (1950); *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); cf. *FTC* v. *Sperry Hutchinson Co.*, 405 U.S. 233 (1972).

[14] Contemporaneous construction also reflects an understanding that the Commission's initiation of proceedings is not subject to review. A commentator reviewing the first decade of the Act's administration noted that no procedure existed to put in issue the sufficiency of the Commission's reasons to believe that a violation had occurred. G. Henderson, *The Federal Trade Commission Act* 49-50 (1924).

Commission should initiate a proceeding is committed to the agency's discretion and is therefore not reviewable. As Judge Carter observed in dissent (App. B, *infra*, 17a), "judicial review of prosecutorial discretion in the administrative area is generally rejected," whether the agency's decision is in favor of, or against, prosecution. Thus, the General Counsel of National Labor Relations Board has unreviewable discretion in deciding whether to issue, or deny, an unfair labor practice complaint. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); cf. *Southern Ry.* v. *Allied Seaboard Milling Corp.*, *supra* (ICC has unreviewable discretion whether to suspend and investigate railroad tariff); *Morris* v. *Gresette*, *supra* (Attorney General has unreviewable discretion whether to object to a State's change in its election laws under Voting Rights Act). The Commission's discretion is equally broad. See *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958).[15] If, as the court below has held, reason to believe is a separate, reviewable legal requirement, complaining consumers and competitors disappointed by the Commission's failure

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[15] While the discretion to institute administrative proceedings, like the discretion to bring criminal charges, is extremely broad, "there are undoubtedly constitutional limits on its exercise." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978). Thus, a claim that the Due Process Clause was violated because the decision to issue a complaint was based upon an unjustifiable standard such as race, religion, or other arbitrary classification would be subject to judicial review after issuance of a final order (see note 17, *infra*).

to initiate a proceeding presumably could, like respondent, claim a right to judicial review of whether the Commission had made an independent "reason to believe" determination on their grievance. It has long been held, however, that denial of such a request is final and unreviewable. *FTC* v. *Klesner*, 280 U.S. 19, 25 (1929).

Finally, judicial review of whether the Commission in fact made a "reason to believe" determination would, as Judge Carter pointed out (App. B, *infra*, 18a), require the courts to inquire into the mental processes of the Commissioners. Such an inquiry would impair the integrity of the administrative process. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). The collegial nature of the decision-making process in the Commission and similar agencies exacerbates the impropriety of such an inquiry. In this case the district court would have to assess the deliberations of five individuals, only one of whom is currently a member of the Commission,[16] to determine, among other things, whether, and to what extent, their collective determination was influenced by congressional pressure. The very nature of this inquiry strongly indicates that whether the commission "independently" made a "reason to believe" determination is a matter that Congress has committed to agency discretion and is thus unreviewable under 5 U.S.C. 701(a)(2).

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[16] At the time of the administrative complaint, only present Commissioner Dixon was a member of the Commission.

2. The court of appeals' holding that the issuance of an administrative complaint is "final agency action" within the meaning of 5 U.S.C. 704 independently warrants this Court's consideration. Even if it is assumed that the Commission's decision to issue a complaint is ultimately subject to judicial review (but see pages 10-16, *supra*), by permitting immediate interlocutory review of that question the court of appeals has seriously departed from the statutory scheme established by Congress for review of Commission actions. Moreover, the court appears to have disregarded this Court's decisions expressing the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

Under 15 U.S.C. 45(c), any party subject to a cease and desist order issued by the Commission may, at the conclusion of the administrative proceeding, petition the court of appeals for review. In enacting that subsection, Congress provided a particular method for judicial review of the Commission's orders. This procedure is exclusive, for where Congress "has enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965);

*City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). The decision so to limit judicial review reflects a policy choice by Congress designed to forestall piecemeal litigation and disruption of the administrative process. See, *e.g.*, *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 600-602 (1950); *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383-384, 385 (1938); *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*.

The court of appeals disregarded its duty to respect that choice. Cf. *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977). It held (App. B, *infra*, 14a) that immediate interlocutory review was available in the district court because, under 5 U.S.C. 704, eventual review in the court of appeals of a future cease and desist order would not be an "adequate remedy." But as Judge Carter correctly concluded (*id.* at 20a-21a), the "no other adequate remedy" provision in 5 U.S.C. 704 "was not intended to convert preliminary agency decisions that otherwise become moot into final agency actions in order to afford judicial review. Rather, it is designed to exempt 'final agency action' from judicial review under the APA if there is an adequate alternative legal remedy."

Furthermore, if the court of appeals was correct in holding that the "reason to believe" standard is a judicially enforceable restriction on the Commission's discretion, there is no reason why the propriety of the issuance of the complaint could not await review of any cease and desist order ultimately issued

by the Commission.[17] Nor would a post-proceeding review be inadequate because respondent has been denied an opportunity to make a record on its claim that the complaint was improperly issued. Such an argument in favor of interlocutory review would apply with equal force to every ruling made by the agency in the course of the proceeding that limits the admissibility of evidence. If the Commission errs in such rulings, so that the agency record is inadequate on any reviewable issue, the court of appeals may either remand the proceeding to the Commission for supplementation of the record, or modify or set aside the Commission's order, with or without remand as appropriate. 15 U.S.C. 45(c); 5 U.S.C. 705. Ultimately it is the Commission that must bear the risk that a court "will reverse its final order, condemn its proceeding as so much waste motion and order that the proceeding be conducted over again * * *." *Thermal Ecology Must Be Preserved* v. *AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970) (*per curiam*).

Moreover, the court's conclusion that respondent is entitled to immediate review because its challenge to the issuance of the complaint may become moot (if

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[17] The Court has held, for example, that if the Commission attempts to enforce a private claim for unfair competition, in violation of the requirement in 15 U.S.C. 45(b) that its proceeding be in the public interest, the defect may be raised in proceedings to enforce the Commission's final order. *FTC* v. *Klesner, supra*, 280 U.S. at 29-30. Similarly, a claim of discriminatory enforcement may be reviewed on petition to the court of appeals from the final order. *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251-252 (1967).

respondent prevails in the administrative proceeding) ignores one of the basic purposes of the exhaustion doctrine—the avoidance of unnecessary judicial consideration of preliminary or procedural rulings entered in the course of an administrative proceeding. See *McKart* v. *United States*, 395 U.S. 185, 192-195 (1969); *McGee* v. *United States*, 402 U.S. 479, 484 (1971); *Parisi* v. *Davidson*, 405 U.S. 34, 37-38 (1972). The court of appeals' mootness analysis would read the requirement for exhaustion of remedies out of the law, since its analysis necessarily would apply to every adverse interlocutory ruling made in the course of any administrative proceeding that might terminate in favor of the respondent party.[18]

Finally, the court of appeals has ignored the principle that "without a clear showing of irreparable injury, failure to exhaust administrative remedies serves as a bar to judicial intervention in the agency process." *Renegotiation Board* v. *BannerCraft Co.*, 415 U.S. 1, 24 (1974). No such injury results from the requirement that a party respond to an administrative complaint, even though litigation expenses may be substantial and unrecoverable and the conduct of litigation burdensome and inconvenient. "The expense and annoyance of litigation is 'part of the

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[18] See *Chamber of Commerce* v. *FTC*, 280 Fed. 45, 48-49 (8th Cir. 1922), holding that the courts have no authority to entertain interlocutory challenges to the Commission's jurisdiction. This decision was cited approvingly in *FPC* v. *Metropolitan Edison Co., supra*, 304 U.S. at 385.

social burden of living under government.'" *Petroleum Exploration Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938); *Renegotiation Board* v. *BannerCraft Co.*, *supra*, 415 U.S. at 24; *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, 303 U.S. at 51-52.[19]

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[19] The court of appeals incorrectly relied (App. B, *infra*, 14a) on *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976) in support of its "irreparable injury" ruling. The decision in *Eldridge* "merely adhered to the well-established principle that when constitutional questions are in issue, the availabiilty of judicial review is presumed, and [this Court] will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." *Califano* v. *Sanders*, *supra*, 430 U.S. at 109. The question whether the Commission made an "independent" "reason to believe" determination is clearly not of constitutional scope.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
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ALICE DANIEL
*Assistant Attorney General*

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DECEMBER 1979

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Civil No. C-75-0860-LHB

[Filed Oct. 3, 1975]

ORDER OF DISMISSAL

STANDARD OIL COMPANY OF CALIFORNIA,
PLAINTIFF.

*v.*

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member; M. ELIZABETH HANFORD, Member; STEPHEN A. NYE, Member, DEFENDANTS.

This action having come regularly on for hearing before the Court on the defendants' motion to dismiss on the grounds the plaintiff has failed to state a claim upon which relief can be granted, and

The Court having considered the pleadings and heard argument of the respective parties, and the matter having been duly submitted,

IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss be and it is hereby granted;

2. The complaint and action are hereby dismissed; and

3. The respective parties shall bear their own costs herein.

Dated:

/s/ Lloyd H. Burke
LLOYD H. BURKE
United States District Judge

Approval as to Form.

GEORGE A. SEARS
Attorney for Plaintiff

## APPENDIX B

## UNITED STATES COURT OF APPEALS
## NINTH CIRCUIT

No. 75-3678

STANDARD OIL COMPANY OF CALIFORNIA,
PLAINTIFF-APPELLANT,

*v.*

FEDERAL TRADE COMMISSION, LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member, MAYO J. THOMPSON, Member, MARY ELIZABETH HANFORD, Member, STEPHEN A. NYE, Member, DEFENDANTS-APPELLEES.

May 18, 1979

Appeal from the United States District Court for the Northern District of California.

Before ELY, CARTER and TANG, Circuit Judges.

TANG, Circuit Judge.

Standard Oil Company of California (SOCAL) appeals from a judgment dismissing an action in which SOCAL sought review of certain aspects of the Federal Trade Commission's (FTC) decision to issue an administrative complaint under § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) (1970) (amended Supp. V 1975). The issue raised is to what extent the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976), allow the district court to review the FTC's stated determination that it has "reason to believe" that SOCAL

is engaged in monopolistic practices in violation of law. Under 15 U.S.C. § 45(b), this "reason to believe" determination is a prerequisite to the issuance of an FTC complaint.[1] We conclude here that what constitutes "reason to believe" is unreviewable because the "reason to believe" determination is committed to the FTC's discretion. However, we also conclude that the issue whether the FTC did or did not in fact make a "reason to believe" determination is reviewable.

## FACTS

Because SOCAL's complaint was dismissed for failure to state a claim upon which relief can be granted, the following facts alleged in SOCAL's complaint must be accepted as true. *East Oakland-Fruitvale Planning Council* v. *Rumsford*, 471 F.2d 524, 527 (9th Cir. 1972).

In December 1971, the FTC issued a resolution stating its intention to investigate whether the petroleum industry was engaged in unfair trade practices. Seventeen months passed and the FTC made no ap-

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[1] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) (1970) (amended Supp. V 1975), provides as relevant:

> Whenever the Commission shall have reason to believe that any . . . corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce . . . it shall issue and serve upon such . . . corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

parent effort to investigate SOCAL either through examination of its officers or employees or through review of corporate records. Then, on May 31, 1973, Senator Henry M. Jackson, Chairman of the Senate Interior and Insular Affairs Committee and of the Permanent Investigation Subcommittee of the Senate Committee on Government Operations, sent a letter to FTC Chairman, Lewis A. Engman, requesting that, within 30 days, the FTC provide a report on the relation between the petroleum and related industries and the current and prospective shortages of petroleum products. One day after the letter was sent, the FTC issued subpoenas to three SOCAL officers and shortly thereafter on July 6, 1973, the FTC issued SOCAL a subpoena duces tecum to produce certain corporate books and records.

On July 6, 1973, the FTC also responded to Senator Jackson's request for a report by transmitting to him an undated document entitled "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry." Chairman Engman's letter accompanying the report stated: "This report has not been evaluated or approved by the Commission, and the findings and conclusions contained in the report do not necessarily reflect the views of the Commission."

On July 13, Senator Jackson released the preliminary FTC report for publication as a committee print. In the week folowing, the FTC issued complaint number 8934 charging SOCAL and seven other oil companies with various antitrust violations. However,

just two days prior to Senator Jackson's release of the report for publication, Chairman Engman had warned that publication of the report would be "inconsistent with [the FTC's] duty to proceed judiciously and responsibly" in determining what, if any, further action should be taken by the FTC.

Prior to the filing of its district court complaint, SOCAL sought relief in the administrative proceeding. In January 1974, SOCAL filed a motion in the FTC proceeding for dismissal of the complaint without prejudice. It argued that Congressional pressure alone had led to the premature termination of the FTC investigation and that the FTC had issued the complaint without "reason to believe" SOCAL had committed a violation. In February, after an administrative law judge certified SOCAL's motion to the FTC, the motion was denied. Later the FTC refused SOCAL's motion for reconsideration.

This action was filed in May 1975. SOCAL prayed that the district court compel the FTC to withdraw or dismiss the administrative complaint. SOCAL claimed that the FTC had arbitrarily and capriciously issued the complaint without facts sufficient to warrant a reasonable belief that SOCAL had violated the law. SOCAL also claimed that, in deciding to issue the complaint, the FTC had improperly considered Congressional pressure and legally irrelevant political and economic factors.

SOCAL also pleaded other facts to support its claim that the agency lacked "reason to believe" SOCAL had violated the Act. For example, counsel

for the FTC was unable to provide a satisfactory list of witnesses or documents as ordered by the administrative law judge. Apparently, the FTC did not have even one proposed witness to be called in the proceeding. Also, in light of the FTC's discovery problems, the administrative law judge had recommended in October 1974 that the FTC withdraw the complaint pending further investigation. The FTC rejected this suggestion.

In sum, SOCAL claimed that the FTC had abused its power to issue complaints under 15 U.S.C. § 45 (b). The district court, however, dismissed SOCAL's action on grounds that it did not have authority to inquire into what constituted "reason to believe" under 15 U.S.C. § 45(b).

## DISCUSSION

SOCAL argues that it is entitled to relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. The FTC is an agency subject to the APA. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644, 70 S.Ct. 357, 94 L.Ed. 401 (1950). Moreover, as SOCAL pleaded, the district court had jurisdiction under 28 U.S.C. § 1331. *See Califano* v. *Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed2d 192 (1977).

Nevertheless, the FTC claims that the issuance of the administrative complaint is not within the purview of the APA because it is not "agency action"

under 5 U.S.C. §§ 551(13) and 702.[2] We disagree. The language of § 551(13) admits of the interpretation that the subsection is illustrative rather than exclusive. Moreover, Congress has manifested its intent that the APA cover a "broad spectrum of administrative actions." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Consequently, the APA's generous review provisions are given a hospitable interpretation. *Id.* at 140-41, 87 S.Ct. 1507. There is also a presumption of judicial review under the APA unless there is clear and convincing evidence that Congress intended to foreclose review of a final agency action either by a specific statute or by committing action to agency discretion. *See, e.g., Morris* v. *Gressette*, 432 U.S. 491, 500-01, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975); *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 140, 87 S.Ct. 1507; *Washington* v. *United States Environmental Protection Agency*, 573 F.2d 583, 587 (9th Cir.

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[2] The cited statutes provide as relevant:

> "[A]gency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

5 U.S.C. § 551(13).

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702.

1978); *Montana Chapter of Association of Civilian Technicians, Inc.* v. *Young*, 514 F.2d 1165, 1168 (9th Cir. 1975). Therefore, the relevant question is not whether the FTC's issuance of complaint number 8934 is "agency action" as to SOCAL—for almost any act an agency takes can be "agency action"—but whether, under the APA, it is reviewable agency action. The latter inquiry triggers the following questions: first, whether a statute precludes judicial review, 5 U.S.C. § 701(a)(I); second, whether agency action is committed to agency discretion by law, 5 U.S.C. § 701(a)(2); and third, whether there is final agency action for which there is no adequate judicial remedy other than review under the APA.[3]

There is no statute precluding judicial review of the FTC's determination that there is "reason to believe" the charged party has violated the law. Therefore, inquiry proceeds to whether the "reason to believe" determination lies entirely within the FTC's discretion. 5 U.S.C. § 701(a)(2). The

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[3] The cited statutes provide as relevant:

> This chapter [5 U.S.C. §§ 701-706] applies, according to the provisions thereof, except to the extent that —
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a).

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

APA's exception for actions committed to agency discretion applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971). When no law fetters the exercise of discretion, the courts have no standard by which to measure the lawfulness of agency action, and consequently, the action is not susceptible to judicial review. *City of Santa Clara* v. *Andrus*, 572 F.2d 660, 666 (9th Cir. 1978), *cert denied*, —— U.S. ——, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978).

Under this standard, a determination by the FTC that there is "reason to believe" a violation of law has occurred is within the agency's discretion and not reviewable in the district court under the APA. In *Hills Bros.* v. *Federal Trade Commission*, 9 F.2d 481, 483-84 (9th Cir.), *cert. denied*, 270 U.S. 662, 46 S.Ct. 471, 70 L.Ed. 787 (1926), this Court stated that a determination that an FTC complaint would be in the public interest, like the determination that there is "reason to believe" the law has been violated, lies within the FTC's discretion. Later case law upholds the validity of this early statement. Section 5 of the Federal Trade Commission Act is a broad delegation of power by Congress to the FTC. The Act empowers the FTC to determine in the first instance whether a method of competition or an act or practice is unfair. *See, Atlantic Refining Co.* v. *Federal*

*Trade Commission*, 381 U.S. 357, 367, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 640-41, 70 S.Ct. 357. The necessary companion to the FTC's power to develop in the first instance the meaning of the statutory term "unfair" is the power to determine whether there is "reason to believe" that a party is engaged in "unfair" conduct. Judicial intervention in this legitimate decision making process would serve only to hamper or thwart the FTC's exercise of the power granted to it by Congress.

However, the facts alleged in SOCAL's complaint do not allow inquiry to end with our conclusion that the determination of what constitutes "reason to believe" is committed to the FTC's discretion. The rule of *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, provides that judicial review is foreclosed when there is no law to apply in a "given case." Accordingly, a complaint in a given case must be examined to see whether it raises claims for which there is law to apply. *Strickland* v. *Morton*, 519 F.2d 467, 471 (9th Cir. 1975). In this respect, the courts will review an agency action when the alleged abuse of discretion is the violation of "constitutional, statutory, regulatory or other legal mandates or restrictions." *Ness Investment Corp.* v. *United States Department of Agriculture*, 512 F.2d 706, 715 (9th Cir. 1975). *See also City of Santa Clara* v. *Andrus*, *supra*, 572 F.2d at 666. Such issues must be reviewed "though other aspects of the agency action

may be committed to the agency's expertise and discretion." *East Oakland-Fruitvale Planning Council* v. *Rumsford, supra*, 471 F.2d at 533.

Under the above standard, there is a reviewable issue in this case. A restriction on the FTC's discretion is embodied in the very terms of 15 U.S.C. § 45(b). The FTC must first in fact make a "reason to believe" determination that the law has been violated. *See Hunt Foods and Industries, Inc.* v. *Federal Trade Commission*, 286 F.2d 803, 806 (9th Cir.), *cert. denied*, 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190 (1961). The restriction provides "law to apply" in this case because SOCAL claims that the FTC disregarded the restriction and acted outside the term of the statute. SOCAL claims that FTC complaint number 8934 was hurriedly issued with hardly any precomplaint investigation of SOCAL and under the pressure of outside influences. In short, SOCAL claims that the FTC did not make and, in the circumstances, could not have made the "reason to believe" determination despite a recitation on the face of the FTC complaint that the determination had been made.

The allegations in SOCAL's complaint and the reasonable inferences from the allegations support SOCAL's claim. As alleged, no investigation of SOCAL occurred for 17 months after the FTC had resolved to investigate the petroleum industry. Then, immediately after the reception of Senator Jackson's request, the FTC took the testimony of three SOCAL

officers. Shortly thereafter, the FTC subpoenaed SOCAL records. But at the same time the subpoena issued, the FTC sent Congress a report which, as FTC Chairman Engman expressly stated, had not been evaluated or approved by the FTC. Chairman Engman also stated that publication of the report would be inconsistent with the FTC's duty to proceed judiciously and responsibly. Nonetheless, within a few days of publication, complaint number 8934 issued naming SOCAL as a respondent. All the above described events occurred in the brief period May 30 to July 18, 1973. Moreover, after administrative proceedings on the complaint had commenced, the FTC ran into severe discovery difficulties. This led the administrative law judge to suggest that the FTC might wish to consider dismissing the complaint so that a fuller investigation could take place.

Considering the alleged timing and circumstances, SOCAL's allegations are sufficient to raise the claim that the FTC either acted without deliberation as to SOCAL or felt itself goaded into action by outside influences. Because FTC complaints should not issue other than as prescribed in 15 U.S.C. § 45(b), SOCAL's claims should be reviewed. However, we emphasize that review is limited. It cannot extend to an assessment by the district court of what constitutes "reason to believe" but simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a "reason to believe" determination at all.

If the district court finds as a fact that the FTC made the "reason to believe" determination albeit with outside pressures, then it can be concluded that the FTC has complied with 15 U.S.C. § 45(b) and further review would be foreclosed. If on the other hand the district court finds that the complaint was issued solely because of outside pressure or with complete absence of a "reason to believe" determination, then the FTC has not complied with the Act.

We must further determine whether there has been a "final agency action" as to SOCAL for which there is no adequate judicial remedy other than review under the APA. The finality element in 5 U.S.C. § 704 should be interpreted in a "pragmatic" way. *Abbott Laboratories* v. *Gardner, supra*, 387 U.S. at 149, 87 S.Ct. 1507. If possible, statutory finality requirements in general should not be construed so as "to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n. 11, 96 S.Ct. 893, 901, 47 L.Ed. 18 (1976). In this case, SOCAL has exhausted administrative remedies by raising its claim before the FTC. SOCAL is presently obligated to respond in administrative proceedings that allegedly have been initiated in an unlawful manner. Without review now, the alleged unlawfulness is likely to become insulated from any review. If SOCAL should prevail in the FTC proceedings, the claims raised now would become moot and, therefore, unreviewable. Moreover, assuming that a court of ap-

peals could properly entertain SOCAL's present claims upon review of a cease and desist order under 15 U.S.C. § 45(c), it is unlikely that the record of the completed administrative proceedings would be sufficient to determine the claims for the simple reason that the FTC has already rejected them on legal grounds and thus foreclosed SOCAL from developing relevant facts. Furthermore, an appellate court would proceed to consider only whether the FTC order is supported by the evidence and a reasonable legal theory, and, therefore, would have no reason to reach the issue raised by SOCAL of an unlawful complaint. 15 U.S.C. § 45(c); *Atlantic Refining Co.* v. *Federal Trade Commission, supra,* 381 U.S. at 367-68, S.Ct. 1498. We therefore find that the issuance of the FTC complaint number 8934 was a "final agency action" as to SOCAL.

## CONCLUSION

The judgment of the district court is vacated and the case is remanded for proceedings consistent with this opinion.

JAMES M. CARTER, Circuit Judge, concurring and dissenting:

(1) I concur in that portion of Judge Tang's opinion holding that a determination by the Federal Trade Commission (hereafter "FTC") that there is "reason to believe" a violation of law has occurred, is within the agency's discretion and not reviewable in

the district court under the Administrative Procedure Act (hereafter "APA"). (2) I dissent from the holding that there is reviewable by the court the question as to whether the FTC did or did not make a "reason to believe" determination. (3) I also dissent from the holding that FTC's action was "final action" and thus reviewable.

*The Remand to Determine if the FTC Made a Determination*

The opinion should have ended after point (1) above. In my opinion the discussion of the additional points (2) and (3) above referred to is foreclosed by what the majority decided as to the first point. If the "reason to believe" decision is not reviewable, then it seems wrong to me to decide whether the FTC did or did not make a "reason to believe" determination is reviewable. Had the first point been decided otherwise, namely, that the determination as to "reason to believe" a violation had occurred was reviewable, then, of course, it would follow there could be reviewed also the question as to whether or not the FTC did actually make a "reason to believe" determination. But since the majority held that the "reason to believe" decision was not reviewable but rested in agency discretion, it seems wrong to me to hold, as the majority does, as to the second point.

The government's brief demonstrates the rule that action by the FTC in starting a proceeding is agency action committed to agency discretion. The law is

based upon the general theory of prosecutorial discretion and the APA exception for agency discretion. Thus judicial review of prosecutorial discretion in the administrative area is generally rejected, whether the agency's decision is for prosecution (*e.g.*, *Miles Laboratories, Inc.* v. *FTC*, 50 F.Supp. 434 (D.D.C. 1943), *affirmed*, 78 U.S.App.D.C. 326, 140 F.2d 683, *cert. denied*, 322 U.S. 752, 64 S.Ct. 1263, 83 L.Ed. 1582 (1944); *Hills Bros.* v. *FTC*, 9 F.2d 481 (9 Cir.), *cert. denied*, 270 U.S. 662, 46 S.Ct. 471, 70 L.Ed. 787 (1926)), or whether the agency's decision is against prosecution (*e. g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) (NLRB) (dictum); *Kixmiller* v. *SEC*, 160 U.S.App.D.C. 375, 379, 492 F.2d 641, 645 (1974)).

In such cases the regularity of prosecutorial discretion is generally assumed. Only the most unusual and compelling circumstances, which must be specially pleaded, will permit inquiry into whether the prosecutor's conduct falls outside the discretion permitted to him and be subject to review. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *United States* v. *Steele*, 461 F.2d 1148 (9 Cir. 1972). No such facts are pleaded in this case.

In *Hills-Bros.* v. *FTC*, *supra*, this circuit held that notwithstanding the "reason to believe" standard in the FTC Act, the discretion of the FTC to issue complaints was no different from other generally non-reviewable prosecutorial determinations. It held it

was not necessary for the FTC to list its specific grounds for its "reason to believe."

Although the APA was enacted in 1946, the provision for exceptions from judicial review "agency action . . . committed to agency discretion by law" was a restatement of existing law. See "Administrative Procedure Act, Legislative History," S.Doc. 248, 79th Congress, 2d Session, 229-30 (1946). Thus the principles set forth in *Hills Bros.* in 1926 were reaffirmed by Congress when it enacted the APA in 1946.

Finally, judicial review of whether FTC made a determination of "reason to believe," etc., would require courts to probe the mental processes of the Commissioners, a procedure disapproved in *United States* v. *Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

The decision in the case at hand as to the second point, allowing review to determine if the FTC actually made a determination of "reason to believe," would open a can of worms and lead to various appeals of preliminary acts and orders. The decision is incorrect and inconsistent with the prior holding that the "reason to believe" decision is action committed to agency discretion and not reviewable by this court.

With the slight opening for review provided by the second point of this decision, I foresee that there will be attempts in every FTC proceeding to seek review of some preliminary matter. This could cripple FTC's ability to function.

I would hold that since determination of the "reason to believe" issue was committed to agency discretion and exempted from judicial review under 5 U.S.C. § 701(a)(2), and since nothing in plaintiff's district court complaint creates any genuine issue as to the regularity of the Commission's complaint, judicial review of the Commission's decision to issue the complaint is unwarranted and improper.

*Final Agency Action Under 5 U.S.C. § 704*

The majority also holds that the action of the FTC was final agency action under 5 U.S.C. § 704 (point (3), *supra*). I disagree. The review of the Commission's proceedings should await the final action of the Commission.

In *Gifford-Hill & Co.* v. *FTC*, 173 U.S. App.D.C. 135, 137, 523 F.2d 730, 732 (1975), the court held that a "decision [by the FTC] to institute an adjudicatory proceeding is not an 'agency action'—and most certainly not a 'final agency action'—made reviewable by the [Administrative Procedure Act]." *See also Miles Laboratories* v. *FTC*, 78 U.S. App.D.C. 326, 328, 140 F.2d 683, 685, *cert. denied*, 322 U.S. 752, 64 S.Ct. 1263, 88 L.Ed. 1582 (1944).

In *Chamber of Commerce* v. *FTC*, 280 F. 45 (8 Cir. 1922) the FTC filed a complaint alleging that the Commission had reason to believe that petitioners were engaging in unfair competition. The petitioners sought judicial review of the issuance of the complaint. The court of appeals held that "neither the District Court nor this court has power under the act

[FTC] to interfere with the investigation and inquiry of the Commission" (*id.*, p. 48), and dismissed the action. The court's holding was specifically approved by the Supreme Court in *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222, n. 21, 58 S.Ct. 834, 82 L.Ed. 1294 (1938) and in *Federal Power Comm'n* v. *Edison Company*, 304 U.S. 375, 385, 58 S.Ct. 963, 82 L.Ed. 1408 (1938).

Plaintiff contends that the issue of the administrative complaint should be treated as "final" under 5 U.S.C. § 704 and that exhaustion of administrative remedies should not be required, because, in the absence of judicial review at the preliminary stage, the validity of the issuance of the administrative complaint cannot later be reviewed or becomes moot. Plaintiff contends that if the complaint is ultimately dismissed by the Commission, there would be nothing to review; that if the proceedings ultimately result in a cease and desist order, a review is limited to the validity of that order and does not extend to the propriety of the issuance of the underlying complaint, citing *Hills Bros.* v. *FTC, supra* (9 F.2d at 484). Thus plaintiff argues that the issuance of the administrative complaint should be deemed "final" for review purposes because, otherwise, there would be "no adequate remedy in a court" for a review of the matter.

The contention is without merit. The issuance of the complaint is a preliminary agency determination and not "final" in any effective sense. Plain-

tiff's argument is based on a misconception of the purpose and meaning of the "no other remedy" provision in 5 U.S.C. § 704. That provision or condition was not intended to convert preliminary agency decisions that otherwise become moot into final agency actions in order to afford judicial review. Rather, it is designed to exempt "final agency action" from judicial review under the APA if there is an adequate alternative legal remedy. *See, e. g., Warner* v. *Cox*, 487 F.2d 1301, 1304 (5 Cir. 1974). *See generally Richfield Oil Corporation* v. *United States*, 207 F.2d 864, 869, 870 (9 Cir. 1953).

Plaintiff's remedy, which is an adequate one, is to test the validity of the final effective agency action. The cease and desist order is subject to judicial review and the findings of the Commission must be supported by substantial evidence.

Plaintiff is seeking an exception to the rule requiring exhaustion of administrative remedies. APA's limitation of judicial review to cases involving "final agency action" is a codification of the "exhaustion" rule. The rule is justified by "very practical notions of judicial efficiency . . . ." *McKart* v. *United States*, 395 U.S. 185, 194, 195, 89 S.Ct. 1657, 1663, 23 L.Ed. 2d 194 (1969).

Legal expenses in pursuing defenses to administration action (or remedies) is not a sufficient reason to avoid the exhaustion requirement. *Petroleum Exploration Inc., supra* (304 U.S. 209, 222, 58 S.Ct. 963, 82 L.Ed. 1408).

> "To permit judicial review . . . . of every procedural, preliminary and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays . . . and would render orderly administrative proceedings impossible. Moreover, it would result in bringing to the courts such an avalanche of trivial procedural questions as largely to monopolize their time and energies." *Utah Fuel Co.* v. *National Bituminous Coal Comm'n*, 69 App.D.C. 338, 339, 101 F.2d 426, 432 (1938).

Exceptions to the exhaustion doctrine apply only in "very unusual and limited circumstances," *Lone Star Cement Corp.* v. *FTC*, 339 F.2d 505, 510 (9 Cir. 1964); and require, for one thing, a showing of substantial prejudice, *i.e.*, "irreparable injury." *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974); *McKart* v. *United States, supra* (395 U.S. at 197, 89 S.Ct. 1657) (incarceration). No irreparable injury to plaintiff is shown in this case.

The decision should be limited to the first point referred to above. I would affirm on that basis alone.

## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-3678

[Filed Aug. 6, 1979]

STANDARD OIL COMPANY OF CALIFORNIA,
PLAINTIFF-APPELLANT

*vs.*

FEDERAL TRADE COMMISSION: LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member, MAYO J. THOMPSON, Member; MARY ELIZABETH HANFORD, Member; STEPHEN A. NYE, Member, DEFENDANTS-APPELLEES

## ORDER

Before: ELY, CARTER and TANG, Circuit Judges

The majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

Judge Carter votes to grant the petition for rehearing and recommends granting the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

## APPENDIX D

## STATUTES

1. 15 U.S.C. 45 provides in pertinent part:

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

* * * *

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein at least thirty days after the service of said complaint. * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * *.

2. 5 U.S.C. 701 provides in pertinent part:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.
>
> * * * *

3. 5 U.S.C. 703 provides in pertinent part:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action * * *
>
> Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

4. 5 U.S.C. 704 provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.
>
> * * * *

## APPENDIX E

BEFORE FEDERAL TRADE COMMISSION
UNITED STATES OF AMERICA

Commissioners: Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford

Docket No. 8934

IN THE MATTER OF

EXXON CORPORATION
a corporation, ET AL.

## ORDER DENYING MOTION TO DISMISS

By motion to the administrative law judge dated January 2, 1974, respondent, Standard Oil Company of California, requested, among other things, dismissal of the complaint herein. The administrative law judge at first denied this request but subsequently, upon respondent's motion, he certified this matter to the Commission. He also certified certain motions to dismiss which were made and denied at the prehearing conference held December 18, 1973. (Tr. 99-100). This action was proper because respondents' motions raise questions regarding the Commission's exercise of its administrative discretion which involve considerations outside the judge's adjudicative authority. *Crush International Limited*, 80 F.T.C. 1023 (1972).

Upon consideration of respondents' motions to dismiss the Commission finds no reason to reconsider its decision to issue this complaint. Accordingly,

IT IS ORDERED that the aforesaid motions be, and they hereby are, denied.

By the Commission.

/s/ Charles A. Tobin
CHARLES A. TOBIN
Secretary

ISSUED: February 12, 1974

IN THE MATTER OF
EXXON CORPORATION, ET AL.

*Docket 8934. Interlocutory Order, June 4, 1974*

Order denying respondents' motions for reconsideration of Commission's prior denial of respondents' motions to dismiss complaint.

ORDER DENYING RECONSIDERATION

By order dated February 1, 1974, the administrative law judge properly certified to the Commission certain oral and written motions to dismiss the complaint in this matter on the grounds that (1) the Commission lacked reason to believe respondents had violated the law at the time it issued the complaint and (2) the proceeding is not in the public interest. The Commission denied these motions by order of February 12, 1974, and respondents now urge reconsideration on those same grounds and, in addition, on an alleged denial of due process and the fact that complaint counsel are pursuing additional post-complaint investigation. Complaint counsel urge the Commission to grant the request for reconsideration and clarify its policy in the area of post-complaint investigations.

Respondents' argument that Congressional interest rather than the public interest prompted the issuance of this complaint is misplaced. None of the communications received by this agency from any mem-

ber of Congress is even remotely of the character deemed improper by the courts. *Pillsbury* v. *FTC*, 354 F. 2d 952 (5th Cir. 1966); *D.C. Federation of Civic Associations* v. *Volpe*, 459 F. 2d 1231 (D.C. Cir. 1971). And it has long been settled that the adequacy of the Commission's "reason to believe" a violation of law has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter.

Nor is there any merit in respondents' argument on the issue of post-complaint investigation. As we have said many times before and reiterated most recently in *Food Fair Stores, Inc.*, Docket 8935, Order of April 23, 1974, the division of the Commission's total investigative effort between the pre-complaint and post-complaint stages is entirely a housekeeping matter between the Commission and its staff, not one that can be used to challenge a post-complaint subpoena or the sufficiency of the Commission's pre-complaint investigation and hence of its "reason to believe" a violation has occurred. Post-complaint discovery by complaint counsel is en-

tirely proper and the sole limits on its proper scope are the requirements of due process that govern in any judicial proceeding, *e.g.*, definiteness of the demand, relevance of the data sought to the issues raised in the pleadings, etc. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641 (1950). Nothing in the papers before us suggest that complaint counsel in this proceeding have exceeded these bounds in their discovery efforts.

The Commision finds no grounds here for reconsidering its prior denial of respondents' motions to dismiss the complaint in this mater. Accordingly,

*It is ordered*, That respondents' motions for reconsideration be, and they hereby are, denied.

Commissioner Nye did not participate.

## APPENDIX F

October 23, 1979

The Honorable Wade McCree, Jr.
Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20530

Dear Sir:

We understand that the Federal Trade Commission, by letter dated September 21, 1979, has requested that you file a petition for a writ of certiorari in the case of *Standard Oil Co. of California* v. *Federal Trade Commission*, 596 F.2d 1381 (9th Cir. 1979). We urge that you grant that request.

*Standard Oil* holds that the Federal Trade Commission's decision to issue an administrative complaint is "final agency action," subject to immediate court review under the Administrative Procedure Act. The opinion strongly implies that the district court may conduct, at this stage of the proceedings, an extensive review of FTC actions leading up to the complaint, including the amount of evidence presented to the Commission and the Commissioners' reasons for approving the action.[1] Although the case

---

[1] The FTC statute at issue, 15 U.S.C. § 45(b), states: "whenever the Commission shall have *reason to believe* that any * * * corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce * * * it shall issue and serve upon such * * * corporation a complaint * * *" (emphasis added). This language is similar to the standard for instituting administrative proceedings in the statutes of various federal agencies. *See, e.g.*, Section 10(b) of the Securities Act of 1933, 15 U.S.C. § 77(b).

admittedly arose in an unusual situation involving the FTC and congressional pressures put upon it, and should be limited to its facts, the court's reasoning is contrary to basic principles of administrative law, generally applicable to other agencies. In addition, we are concerned that the court's opinion is susceptible to various interpretations that could have an adverse impact on the administrative processes of other agencies in other contexts. The legal bases for our concern over these holdings are presented in detail below. But we wish to emphasize at the outset that our concerns are grounded in one very practical consideration: by opening administrative proceedings to such extensive review, and at such an early stage, this opinion threatens to affect adversely the law enforcement efforts of many administrative agencies.

*Finality*

The majority opinion in *Standard Oil* concluded that the FTC's decision to issue a complaint pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, was "final agency action," immediately reviewable under the APA. In this respect, the opinion represents a significant departure from the settled doctrine requiring exhaustion of administrative remedies. The majority based its conclusion upon a concern that, unless the FTC's action was held final and reviewable at this stage, "crucial collateral claims [would] be lost and potentially irreparable injuries [would] be suffered," *citing Mathews* v.

*Eldridge*, 424 U.S. 319, 331 n.11. But, neither Standard Oil Company nor the court has identified any meaningful injury that would befall the company if judicial review were withheld at this time; nor have they properly analyzed whether the company's "collateral claims" would be lost.

The only suggested "injury" Standard Oil might suffer from foregoing interlocutory judicial review is the trouble and expense of responding to the administrative complaint. Numerous cases have held, some of them in rather strong terms, that this trouble and expense do not rise to the level of a legally recognizable "injury." *See, e.g., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938); *Small* v. *Kiley*, 567 F.2d 163, 165 (2d Cir. 1977) (per curiam). The only exception to this principle arises where the expense or burden of complying with the order for a hearing is extraordinary or disproportionate to the business of the respondent. *Petroluem Exploration Inc.* v. *Public Service Commission*, 304 U.S. 209, 220 (1938); *Sears, Roebuck & Co.* v. *NLRB*, 473 F.2d 91, 93 n.3 (D.C. Cir. 1972), *cert. denied*, 415 U.S. 950 (1974). There is certainly no suggestion that this is true in the present case.

Nor would Standard Oil lose forever the opportunity to obtain meaningful review of its "crucial collateral claims" if the court were to deny the company relief at this stage. The APA makes clear that any claimed illegality in the issuance of the complaint may be reviewed upon completion of the action, un-

less the matter is one committed exclusively to the agency's discretion.[2]

The panel majority also expresses a concern that because of the posture of this case, Standard Oil may not be able to develop the record necessary to a proper review of the "reason to believe" issue on appeal. But if the case were to arrive in the court of appeals with a record that was inadequate because the agency had made an error of substantive law, the court likely would remand it to the agency to further develop the record. Indeed, the section of the FTC Act here in question specifically allows for such a

---

[2] "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action." 5 U.S.C. § 704. The reviewing court

> "shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (C) in excess of statutory jurisdiction, authority, or limitations, * * *; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706.

The majority relies upon *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 367-68 (1965), for the proposition that an appellate court, reviewing an agency's cease and desist order, would consider "only whether the FTC order is supported by the evidence and a reasonable legal theory." 596 F.2d at 1387. But the petitioners in *Atlantic Refining* apparently had challenged *only* the final cease and desist order. Thus, the case does not discuss the standard of review a court should apply upon a challenge to other stages of an agency proceeding. If one may generalize at all from the case, it suggests that the standard of review is determined by the amount of discretion the agency had in making the decision under review.

remand.[3] *See Dolcin Corp.* v. *FTC*, 219 F.2d 742, 750-52 (D.C. Cir.), *cert. denied*, 348 U.S. 981 (1955).

In sum, the majority's approach to finality effectively sets the *Mathews* v. *Eldridge* standard to a nullity. It suggests that the expense of defending oneself in an administrative proceeding is "irreparable injury." Yet this expense appears in every administrative case. And, by the majority's reasoning, every challenge to an administrative complaint would be lost if the respondent's challenge were delayed until the administrative proceeding had run its course. Thus, *every* respondent in *every* administrative case could claim that, unless he obtained interlocutory review of the complaint, "crucial collateral claims [would] be lost and potentially irreparable injuries [would] be suffered." Nor is there any language in the opinion to suggest that a respondent must make a high threshold showing of apparent unfairness and abuse before he is entitled to this review. In our view, this result is clearly inconsistent both with the governing case law and with sound policy.

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[3] "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper." 15 U.S.C. § 45(c).

*Prosecutorial Discretion*

The *Standard Oil* opinion directs the district court to probe an executive decision to prosecute an apparent violator. The opinion indicates that certain of the Commission's possible motivations are suspect, in that they take too great an account of congressional expressions of interest. But, prosecutorial agencies have wide discretion in determining whether, and when, to institute proceedings. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Oyler* v. *Boles*, 368 U.S. 448, 456, (1962); *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 413-14 (1958); *Kixmiller* v. *Securities & Exchange Commission*, 492 F.2d 641 (D.C. Cir. 1974); *but see Medical Committee for Human Rights* v. *Securities & Exchange Commission*, 432 F.2d 659 (D.C. Cir. 1970), *dismissed as moot*, 401 U.S. 973 (1971).

Judicial review of the decision to prosecute is narrowly circumscribed. To defend successfully on the basis of abuse of prosecutorial discretion, "one must prove that the selection was deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification." *United States* v. *Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972). Furthermore, the abuse must be obvious from the proferred evidence. *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 250-51 (1967). Successful challenges, such as that in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886), have been characterized by striking disparities between those prosecuted and those not. No substantial indication of

an "arbitrary classification" or the like appears here. Thus, the extensive inquiry proposed by the court, and which we discuss below, would represent serious and unprecedented interference with the authority of administrative agencies to carry forward their enforcement activities.

*Scope of Judicial Inquiry*

The *Standard Oil* opinion sets very indefinite, if not actually contradictory, boundaries for the district court's review, and implies that the lower court is to probe the minds of the Commissioners. In providing guidance to the district court, the majority opinion states:

> "If the district court finds as a fact that the FTC made the 'reason to believe' determination albeit with outside pressures, then it can be concluded that the FTC has complied with 15 U.S.C. § 45(b) and further review would be foreclosed. If on the other hand the district court finds that the complaint was issued solely because of outside pressure *or* with complete absence of a 'reason to believe' determination, then the FTC has not complied with the Act." 596 F.2d at 1386 (emphasis added).

Use of the disjunctive in the second sentence suggests that, even if the Commission made a formal determination that there was a reasonable basis for instituting the action, the district court should still make a separate inquiry into whether the complaint was issued solely *because* of outside pressure. In

other words, the district court may inquire into the Commissioners' reasons for issuing the complaint.

It seems to us quite likely that this type of judicial inquiry would prove inappropriately intrusive. For example, the district court might conclude that it should ask what evidence was before the Commission at the time it made its decision. If the agency produces some such evidence, but a small amount, the court might well proceed to adjudicate whether that evidence was so insufficient as to warrant the conclusion that the complaint was issued "solely" in response to congressional pressures. Several other aspects of the opinion, detailed in the margin, heighten our concern that the court's review might extend to matters such as these.[4] Such broad judicial review,

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[4] Other aspects of the opinion that point up the prospect of inappropriately broad judicial intervention inherent in the panel majority's approach include:

1. As the FTC's brief on appeal pointed out, the administrative complaint stated on its face that the Commission had found "reason to believe" that Standard Oil had violated the antitrust laws. The Ninth Circuit's persistence in the face of this assertion might be read as suggesting that the district court should go beyond examining formal indicia of a "reason to believe" determination.

2. The opinion recites the chronology of facts leading to the issuance of the FTC's complaint. It emphasizes the short time that elapsed between the Commission's July 11 statement to Senator Jackson (indicating that the Commission had not determined what, if any, further action it should take) and the Commission's

however, is inconsistent with the intent of the FTC Act, which commits these matters to agency discretion,[5] with the Administrative Procedure Act, which exempts from court review matters committed by law to agency discretion,[6] and with the continued effectiveness of administrative law enforcement generally. Further, such probing into the Commissioners' men-

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issuance of the Standard Oil complaint seven days later. This portion of the opinion might be read as questioning whether seven days is enough time for the Commissioners properly to weigh the staff's input and make a determination.

3. The opinion emphasizes the FTC's failure to submit a list of witnesses when requested by the ALJ, suggesting that the district court should be impressed by the number of facts—or the lack of them—that the FTC had on hand when it made its decision to issue a complaint.

[5] *Hills Bros.* v. *Federal Trade Commission*, 9 F.2d 481, 483-84 (9th Cir.), *cert. denied*, 270 U.S. 662 (1926); *Montgomery Ward* v. *Federal Trade Commission*, 379 F.2d 666, 672 (7th Cir. 1967) (determination under Section 5 of FTC Act that proceeding would be in the public interest is a matter committed to agency discretion).

[6] 5 U.S.C. § 701(a)(2):

This chapter applies, according to the provisions thereof, except to the extent that—

* * * * *

(2) agency action is committed to agency discretion by law.

See also *Action on Safety and Health* v. *Federal Trade Commission*, 498 F.2d 757, 760-62 (D.C. Cir. 1974).

tal processes is precisely the sort of inquiry forbidden by *United States* v. *Morgan*, 313 U.S. 409 (1941).[7]

In sum, the *Standard Oil* decision threatens to upset the proper balance between individual rights and effective law enforcement efforts by all administrative agencies. Under the present system of administrative law and judicial review, enforcement programs are not subject to premature and disabling judicial intervention, except in circumstances where

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[7] In *Morgan*, the Secretary of Agriculture, acting pursuant to statutory authority, had established maximum prices for trading in the Kansas City Stockyards. Upon review, the lower court authorized the entities challenging the maximum pricing scheme to take the Secretary's deposition. He was questioned at length regarding the process by which he reached his conclusions, including the manner and extent of his study of the record and his consultations with subordinates. The Supreme Court condemned this excursion in strong terms:

> "But the short of the business is that the Secretary should never have been subjected to this examination. 'The proceeding before the Secretary has a quality resembling that of a judicial proceeding.' *Morgan* v. *United States*, 298 U.S. 468, 480. * * * We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary' 304 U.S. 1, 18." 313 U.S. at 442.

In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971), the Court held that, despite *Morgan*, examination of administrative officials is proper in certain limited circumstances. But, in *Overton Park*, the Court was presented with a clear and objective set of factors which the administrator should have considered in making his decision. *Overton Park* thus has no application to the present case, where the "reason to believe" decision is committed entirely to the agency's discretion.

respondents would otherwise suffer irreparable injury. The Ninth Circuit's opinion, however, would greatly increase the interruptions in administrative processes and tip the balance unreasonably toward delay. Federal agencies conduct hundreds of administrative proceedings every year. These agencies cannot function effectively if a substantial number of these proceedings are to be interrupted for premature review, or if Commissioners are constantly required to articulate for the courts the mental impressions that went into formulating their decisions to prosecute.

We trust you share our concern over this unfortunate opinion, and we hope you will give prompt and favorable consideration to the FTC's request. Please feel free to make whatever use of this letter you deem appropriate.

Sincerely,

/s/ Ralph C. Ferrara
RALPH C. FERRARA
General Counsel
Security and Exchange Commission

/s/ Andrew S. Krulwich
ANDREW S. KRULWICH
General Counsel
Consumer Product Safety Commission

/s/ Robert R. Bruce
ROBERT R. BRUCE
General Counsel
Federal Communications Commission

/s/ Brien Kehoe
BRIEN KEHOE
General Counsel
Federal Maritime Commission

/s/ Norton J. Come
NORTON J. COME
Acting General Counsel
National Labor Relations Board

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